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By Terence L. Blackburn

Make Tests Relevant

The Florida Supreme Court has announced that it is raising the minimum score necessary to pass the state bar examination on the basis that "the people of Florida would be placed at risk if we fail to approve the higher standard." Supporting this position, the Florida Bar Examiners assert that the passing score approved more than 20 years ago is too low to ensure that Florida's lawyers are "minimally competent." One wonders how either body reached its conclusions.

State bar officials in a number of other states—most recently New York on September 24—also have decided or are considering whether to make bar examinations more difficult to pass. However, the real issue facing Florida and other states is whether bar examinations themselves are an adequate measure of attorney competence.

Until that question is answered, bar officials should not increase the minimum scores necessary to pass the examinations. And until the real problems with bar examinations are fixed, one might be forgiven for wondering whether the efforts to increase the failure rates on bar examinations are motivated not by a desire to protect the public from incompetent lawyers, but by a desire to protect practicing lawyers from competition with bright, better-educated, new entrants into the legal profession.

In the last 12 years, in response to the American Bar Association's MacCrate Report, most law schools have modified curricula, strengthened clinical programs, reduced class sizes and student-faculty ratios, and placed greater emphasis on writing skills. Most law school deans would say that the quality of legal education today is better, not worse, than it was 10 years ago. Law schools across the country can demonstrate many ways in which the training of law students is increasingly tied to practice—through supervised internships, the effective use of practicing attorneys and judges as adjunct professors, and the enhanced use of clinical programs and simulation courses.

A Public in Peril?

Now it appears that the Florida Bar Examiners and the Florida Supreme Court have concluded that all of that work has been worthless, and that in order to avoid placing the people of Florida at risk, they must require higher scores on the bar examination for those seeking admission to practice. Again, the question must be asked: On what basis was this conclusion reached?

Despite the improvements in legal education, the Florida Bar Examiners have already more than doubled the failure rate for Florida first-time test takers over the last 10 years (11 percent in 1994, 20 percent in 1999 and 24 percent in 2003). Not satisfied, Florida officials have determined that the failure rate should be even higher.

What facts have they considered in reaching this conclusion? We can be certain of what they have not done: They have not conducted any studies showing a correlation between those people who passed the Florida bar examination with low scores and the incidence of malpractice claims. Instead, they simply started with the unproven assumption that the Florida examination adequately tests for minimal competency, and then added another unproven assumption that by raising the minimum score necessary to pass

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the examination, the level of practice competency of those passing the examination will be raised as well.

General Reform

Bar examinations in many states are badly flawed. Raising the minimum passing scores simply compounds the pernicious effect of these flaws. The Code of Recommended Standards for Bar Examiners recommends that examinations determine whether applicants possess a "thorough understanding of legal principles" in "basic and fundamental subjects." Yet essay questions in many states cover too many topics, are often based on esoteric points of law and occasionally are wrongly drafted.

Consider the range of typical bar exams: Florida tests on 14 topics; Michigan recently raised the total number of subjects tested to 16, including workers' compensation and no-fault insurance; New York tests 18 subjects, including estate taxation. It is unlikely that most practicing attorneys could pass a competency test in 16 or 18 subjects without substantial preparation. Why, then, is it required of new applicants to the bar?

Grading of the bar examinations is also flawed. Despite the fact that test scores on the national multistate portion of the exams have remained fairly constant over the last 10 years, failure rates on the bar exams during that period have varied by more than 50 percent in 46 states, and by more than 100 percent in 27 states. What would the reaction be if results varied that widely with respect to the SAT? The obvious conclusion would not be to blame the test takers, but rather to conclude that something was wrong with the test itself or its scoring. By way of analogy, such a conclusion is inescapable here.

The real issue confronting the gatekeepers to our profession is whether the bar examinations are an adequate measure of attorney competence. Legal education prepares students for the practice of law; it is the bar examinations that are out of touch. Bar examinations around the country are broken—and instead of fixing them, bar examiners are making them worse.

If state bar officials are seriously concerned about assessing the competence of new applicants to the bar, they should adhere to the standards of the Code of Recommended Standards for Bar Examiners. This would include reducing the number of subjects tested, ensuring that the questions accurately focus on basic and fundamental subjects and issues, and standardizing the grading processes and results. ◆

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